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OCT - 8 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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October 8, 1996

**BY HAND**

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, NW, Room 222  
Washington, DC 20554

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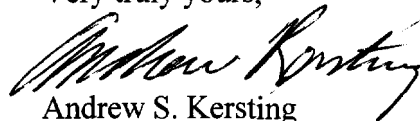
Re: Station KYEG(FM), Canadian, Texas  
MM Docket No. 96-92

Dear Mr. Caton:

Transmitted herewith on behalf of AJI Broadcasting, Inc., licensee of Station KYEG(FM), Canadian, Texas, are an original and six (6) copies of its Reply Findings of Fact and Conclusions of Law in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate directly with the undersigned.

Very truly yours,



Andrew S. Kersting  
Counsel for  
AJI Broadcasting, Inc.

Enclosures

cc (w/ encl.): Certificate of Service (by hand)

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BEFORE THE

**Federal Communications Commission**

OCT 8 1996

WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of ) MM Docket No. 96-92  
)  
AJI BROADCASTING, INC. )  
)  
Order to Show Cause Why the )  
License for Station KYEG(FM), )  
Canadian, Texas, Should Not )  
Be Revoked )

To: Administrative Law Judge Edward Luton

**REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW**  
**OF AJI BROADCASTING, INC.**

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October 8, 1996

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## SUMMARY

The Mass Media Bureau ("Bureau") argues that AJI Broadcasting, Inc. ("AJI") has been less than diligent in responding to Commission deadlines, has not made any progress in the actual construction of Station KYEG(FM), Canadian, Texas, and has not obtained a reasonable assurance that it will have sufficient funds available to reconstruct the station.

Nevertheless, the record establishes that, following consummation of the assignment of Station KYEG(FM) to AJI, and upon discovering that all of the station's equipment had been removed and disposed of, AJI has acted diligently by making substantial and repeated efforts to return KYEG(FM) to on-air operation expeditiously. Although AJI had not installed any of the equipment necessary to return the station to the air as of the August 14, 1996, hearing session, AJI had, *inter alia*, (i) employed an engineering firm, with whom Jack Inman had worked "numerous" times in the past, to provide the necessary equipment and reconstruct the station; (ii) paid a \$7,000 deposit on a new transmitter for the station; (iii) hired an operations manager; and (iv) secured office space in Canadian, Texas. In addition, despite having its efforts to secure the necessary financing to reconstruct the station frustrated by the erroneous legal advice and self-dealing conduct of AJI's former FCC counsel, AJI has secured a financial commitment from Texrock Radio, Inc., to cover the reconstruction of Station KYEG(FM) as well as the station's start-up expenses. Therefore, the Bureau has failed to meet its burden of proof in attempting to establish that AJI does not have the capability and intent to resume broadcast operations expeditiously.

With respect to the second issue, AJI has violated Section 73.1740 of the Commission's rules on two separate occasions. However, these rule violations were inadvertent, of relatively short duration, and do not reflect a deliberate flouting of the Commission's rules. Moreover, they are

mitigated by AJI's extensive and continued efforts to return Station KYEG(FM) to on-air operation, as well as the actions of the licensee's former FCC counsel. Thus, because AJI's violations of Section 73.1740 of the rules do not adversely affect the licensee's basic qualifications, they should not result in revocation of the KYEG(FM) license.

Furthermore, the Bureau has failed to meet its burden of proof in arguing that AJI violated Section 73.1750 of the rules. The record establishes that AJI was not responsible for discontinuing the operation of Station KYEG(FM), and has acted diligently in attempting to resume the station's broadcast operations.

For these reasons, the issues designated in the *Order to Show Cause and Hearing Designation Order* should be resolved in the licensee's favor.

BEFORE THE

**Federal Communications Commission**

WASHINGTON, D.C. 20554

In the Matter of	)	MM Docket No. 96-92
	)	
AJI BROADCASTING, INC.	)	
	)	
Order to Show Cause Why the	)	
License for Station KYEG(FM),	)	
Canadian, Texas, Should Not	)	
Be Revoked	)	

To: Administrative Law Judge Edward Luton

**REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW  
OF AJI BROADCASTING, INC.**

AJI Broadcasting, Inc. ("AJI"), herein proffers its reply findings of fact and conclusions of law in response to the Proposed Findings of Fact and Conclusions of Law ("Findings" or "Conclusions") filed by the Mass Media Bureau ("Bureau" or "MMB") in the above-captioned proceeding. In reply, the following is stated:

I.

**Preliminary Statement**

1. AJI and the MMB each filed proposed findings of fact and conclusions of law in this proceeding on September 24, 1996. In this reply pleading, AJI will address only those aspects of Bureau's Findings which have not been sufficiently addressed in its own Findings.<sup>1</sup>

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<sup>1</sup> AJI's silence concerning certain allegations made by the Bureau should not be construed as acquiescence. In its Findings, AJI set forth what it believes to be an accurate analysis of the designated issues in this proceeding. Further discussion of those matters already sufficiently addressed in AJI's Findings would be merely repetitive, and would not materially assist the Presiding Judge in resolving the designated issues.

II.  
The Bureau Has Failed to Meet Its Burden of Proof  
In Attempting to Demonstrate that AJI Does Not Have  
the Capability and Intent to Resume Broadcast Operations Expeditiously

2. It must be kept in mind that the Bureau, not AJI, has the burden of proof in this proceeding. Having failed to meet its burden, the Bureau has raised matters that are not relevant or are beyond the designated issues.

3. In support of its initial, conclusory contention that AJI will not return Station KYEG(FM) to on-air operation in an expeditious manner, the Bureau claims that AJI has not been responsive to Commission letters or deadlines. MMB Conclusions, ¶2. Specifically, the Bureau notes that although the FCC granted the assignment of Station KYEG(FM) from Carolina Communications to AJI on the condition that KYEG(FM) return to operation within 60 days of consummation, the station is still not operational. *Id.*

4. However, the fact AJI did not comply with the condition that it return KYEG(FM) to operation within 60 days of consummation of the assignment from Carolina Communications has little significance in determining whether the licensee has the capability and intent to return the station to operation expeditiously. It is undisputed that upon consummation of the assignment on February 21, 1995, all of Station KYEG(FM)'s equipment, which had previously been on the site, had been removed and disposed of, an action that was not AJI's doing and beyond its control. There was no equipment available to return KYEG(FM) to on-air operation. AJI Ex. 1, p. 1. Although neither the Commission nor AJI was aware that all of the station's equipment had been removed at the time of the assignment, the condition set forth in the FCC's December 20, 1994, grant effectively required AJI to completely reconstruct the station in 60 days. Thus, the licensee's inability to return

the station to on-air operation within 60 days has little bearing on the question of whether AJI has the capability and intent to resume operations expeditiously because compliance with that condition was not practically feasible.<sup>2</sup>

5. The Bureau also notes that AJI did not respond to the Commission's June 2, 1995, letter concerning the operational status of the station, and that it took a second letter, dated July 17, 1995, to elicit a response from AJI. MMB Conclusions, ¶2. Although the record is unclear concerning why AJI did not respond to the FCC's June 2 letter,<sup>3</sup> AJI responded to the July 17, 1995, letter within three days. MMB Ex. 1, Attach. 3, p. 2; AJI Ex. 1, p. 1.

6. In addition, the Bureau notes that KYEG(FM) has remained off the air without silence authority since October 1, 1995. However, this fact, alone, also is not probative of the issue of whether AJI has the capability and intent to resume broadcast operations expeditiously. Sometime in the latter part of September 1995, AJI's former FCC counsel, William Pennington, told Jack Inman he had until January 31, 1996, either to construct or sell the station. Tr. 80-81; AJI Ex. 1, p. 1. Pennington later advised Inman to sell the station, and Inman entered into a purchase agreement with Jim Hughes, owner of Pampa Broadcasters, Inc. ("PBI"). AJI Ex. 1, p. 2; Tr. 82. After

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<sup>2</sup> Even in the case of an assignment of an operating station, where the assignor has a construction permit to upgrade its facilities, the Commission's rules provide the assignee with a minimum of 12 months from consummation of the assignment to construct the upgraded facility. See 47 CFR §73.3535(c). In this case, Carolina Communications had a pending application to extend its construction permit for KYEG(FM)'s Class C1 facilities (File No. BMPH-930616JB) at the time the station was assigned to AJI. See AJI Findings, ¶¶2, 27 and n.19. Thus, AJI was not afforded treatment equal to that of other similarly situated applicants before the Commission, and should have been given 12 months from the February 21, 1995, consummation of the assignment to complete construction of the Class C1 facilities.

<sup>3</sup> The record is clear that during this time period AJI received less than adequate legal advice from its former FCC counsel.



obtaining signatures from both parties and a filing fee check from Hughes, Pennington told Inman and Hughes that he had filed the application with the Commission. AJI Ex. 1, p. 2; Tr. 73. *See also* AJI Ex. 1, Attach. 2. Nevertheless, in March 1996, Hughes informed Inman that the assignment application had not been filed with the FCC, and that Pennington was demanding an additional \$1,500 from PBI before he would file the application. AJI Ex. 1, p. 2; Tr. 73-74, 82. Thus, although KYEG(FM) has remained off the air since October 1, 1995, without silence authority, this fact is not determinative of the question concerning AJI's capability and intent to resume broadcast operations expeditiously, especially considering that during the six-month period between October 1, 1995, and March 1996, AJI made no attempt to return the station to the air, but, instead, acted upon the advice of its former FCC counsel to sell the station, and reasonably believed that an assignment application had been filed with the Commission.

7. As noted in AJI's Findings (*see* ¶47 and n. 17), the Commission generally is reluctant to excuse an applicant's procedural deficiencies because of the alleged malfeasance of counsel. *See, e.g., Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419, 420 n.6 (1986). However, in this case, the record reflects that AJI clearly has been the victim of the wrongful conduct of its former FCC counsel. With respect to the time period between the expiration of Station KYEG(FM)'s silence authority on October 1, 1995, and March 1996, Pennington not only erroneously advised Inman that he had until January 31, 1996, to construct or sell the station, but he refused to file an executed assignment application unless the proposed assignee, PBI, paid him an additional \$1,500. In addition, Pennington frustrated Inman's efforts to obtain financing from a South Carolina broadcaster by attempting to get the same gentleman to invest in another radio station in which Pennington was a part owner. *See* AJI Findings, ¶¶13-14, 16. Thus, the record establishes that AJI's efforts to obtain

financing to reconstruct the station, as well as its efforts to sell the station (in an effort to comply with the Commission's procedural rules), were frustrated by Pennington's self-dealing conduct.

8. The Bureau also claims that AJI has not made any progress in the actual construction of the station, and none of the equipment necessary to return the station to the air has been delivered. MMB Conclusions, ¶3. The Bureau's argument again fails to recognize that AJI has been forced to completely reconstruct Station KYEG(FM). The record establishes that Inman has made diligent and repeated efforts to find financing to "properly" reconstruct the station (*see* Tr. 87-88), only to have his efforts frustrated by the unexpected death of his long-time friend and broadcaster, John Pittman (*see* AJI Findings, ¶¶11-12), and the self-dealing conduct of AJI's prior FCC counsel (*Id.* at ¶¶14-16). Upon discovering that Pennington never filed the AJI/PBI assignment application, Inman acted diligently in finding a new source of financing to reconstruct the station. *Id.* at ¶¶17-19.

9. Moreover, with respect to the Bureau's allegation that no station equipment has been delivered, Inman explained that, although he contacted the Canadian, Texas, Chamber of Commerce in an attempt to locate studio space, as of the August 14, 1996, he did not yet have a place in Canadian for the station's equipment to be delivered. Tr. 84.

10. The Bureau also argues that AJI has not presented a "substantially constructed facility [or] a solid plan for its completion" because AJI has not obtained a written agreement with RDG Custom Electronics ("RDG") concerning a construction schedule. MMB Conclusions, ¶3. However, the issue is not whether AJI has a written contract upon which to base a cause of action in the event RDG does not reconstruct Station KYEG(FM) in a timely manner. Instead, the question is whether the Bureau has met its burden of proof in establishing that AJI does not have the capability and intent to resume broadcast operations expeditiously. The relevant and material facts are that Inman, while

working on several different projects for stations where he previously has been employed, purchased equipment from RDG and used their engineering services "numerous times," and never had a written agreement. AJI Ex. 1, p. 3; Tr. 85, 90-91. Although RDG has never let him down before, Inman made clear that he will require RDG to reconstruct the station on schedule. If RDG does not get the work done in a timely manner, he will not hesitate to hire another engineering firm to complete the reconstruction of Station KYEG(FM) on time. Tr. 91-92. The Bureau's argument concerning the lack of a written agreement between AJI and RDG (particularly in light of Inman's past dealings with RDG) is nothing more than an attempt to exalt form over substance, and institute a requirement that has not previously been demanded by the Commission. Moreover, although the existence of a written agreement may facilitate a cause of action against RDG for breach of contract in the event RDG does not reconstruct KYEG(FM) in a timely manner, the mere existence of such an agreement, by itself, would not establish that AJI has the capability and intent to resume broadcast operations expeditiously.

11. The Bureau further raises the red herring that AJI lacks the "financing necessary to effectuate its proposal" because Texrock Radio, Inc. ("Texrock") does not possess the necessary funds to return Station KYEG(FM) to the air. MMB Conclusions, ¶4. According to the Bureau, Texrock has not provided any letters of intent from third parties indicating their willingness to provide financing, and, thus, AJI cannot rely on Texrock to finance the reconstruction of the station. *Id.*

12. The Bureau's argument regarding AJI's financial arrangement with Texrock lacks merit because it is based upon an issue which has not been designated in this proceeding. Indeed, the underlying premise of the Bureau's argument is that AJI is not capable of returning KYEG(FM)

to the air expeditiously because the licensee has not established that it has a reasonable assurance of financing from Texrock. However, no financial qualifications issue has been designated in this proceeding.<sup>4</sup> If the Bureau believed that a financial qualifications issue was necessary<sup>5</sup>, it should have taken the necessary steps to ensure that such an issue was included in the *Order to Show Cause and Hearing Designation Order*, DA 96-584 (MMB, released on April 16, 1996) ("*HDO*"), rather than attempt to add this issue through the back door. The reason AJI has had to search for financing is, as stated above, all of the station's equipment was either removed or disposed of, and AJI has been forced to completely reconstruct the station.

13. Furthermore, it is the Bureau, not AJI, that has the burden of proof in this proceeding. The record establishes that Texrock has formally agreed to loan AJI up to \$200,000 for the reconstruction and initial operation of KYEG(FM) upon certain terms and conditions. See AJI Findings, ¶17. Although Texrock did not have sufficient funding to meet its commitment to AJI on August 14, 1996, Texrock has obtained a financial commitment from RJ Financial, Inc. ("RJ Financial") in the amount of \$21,340,000, which is more than 105 times the amount that Texrock has committed to provide AJI. Tr. 93-94, 96-97. Dain Schult, President of Texrock, met with the President of RJ Financial and negotiated an agreement which provides that RJ Financial will make a series of incremental disbursements of funds to Texrock that are to be used to acquire stations and for other related purposes, including making funds available to AJI. Tr. 95-96. The first

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<sup>4</sup> The fact AJI was financially qualified to purchase Station KYEG(FM) is demonstrated by the fact the assignment from Carolina Communications was consummated.

<sup>5</sup> The Commission's records indicate that Station KYEG(FM) (formerly KRBG) has been off the air since April 30, 1991, due to financial problems. *Order to Show Cause and Hearing Designation Order*, DA 96-584, ¶2 (MMB, released on April 16, 1996).

disbursement was to be in the amount of \$500,000, and was to have been made sometime between August 21 and August 30, 1996.<sup>6</sup> Tr. 95. Texrock has no other commitments that it is required to fund with the initial \$500,000 it receives from RJ Financial. Tr. 99. Therefore, although the record does not contain a copy of RJ Financial's financial commitment letter to Texrock (*see* Tr. 93-94), AJI has made a *prima facie* case that it has secured the necessary financing to reconstruct Station KYEG(FM). The Bureau has failed to meet its burden of establishing that the financial commitment between Texrock and RJ Financial does not exist or is otherwise insufficient, and that AJI lacks the financial capability to reconstruct Station KYEG(FM) expeditiously. Accordingly, Issue 1 should be resolved in the licensee's favor.

### III.

#### AJI Violated Section 73.1740 of the Commission's Rules, But the Violations Are Not Disqualifying

14. As stated in AJI's Findings, at the time the *HDO* was released on April 16, 1996, AJI had violated Section 73.1740 of the rules on two separate occasions for periods of approximately four months, and six and one-half months, respectively. *See* AJI Findings, ¶43. However, as demonstrated above, with respect to the period between October 1, 1995, and March 1996, AJI's violation of Section 73.1740 is substantially mitigated by the actions of its former FCC counsel. *See* AJI Findings, ¶¶14-16, 45. Moreover, AJI's violations of Section 73.1740 should not have an adverse impact upon AJI's basic qualifications because the two rule violations were inadvertent, of relatively short duration, and, as in *Hometown Media, Inc.*, FCC 96D-06 (ALJ, released September

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<sup>6</sup> Schult also negotiated a verbal commitment for an additional loan in the amount of \$100,000, which was to have been wired to Texrock as of August 19, 1996. Tr. 94-96. This additional loan is being provided by Dan Hodges, an investment banker based in Tucson, Arizona. Tr. 96.

17, 1996), do not reflect a "deliberate flouting of the Commission's rules." Therefore, AJI's violations of Section 73.1740 of the rules do not warrant revocation of the KYEG(FM) license. *Cavan Communications*, 10 FCC Rcd 2873 (ALJ 1995); *Hometown Media, Inc.*, *supra*; *Video Marketing Network, Inc.*, 10 FCC Rcd 7611 (MMB 1995).

#### IV.

##### AJI Has Not Violated Section 73.1750 of the Commission's Rules

15. After quoting Section 73.1750 of the rules, the Bureau's entire discussion of this element of Issue 2 consists of the following:

The issue as to whether AJI violated Section 73.1750 must also be resolved against AJI. The station has been off the air since April 1991, and the evidence reveals that AJI has neither the capability nor intent to return it to the air.

MMB Conclusions, ¶9.

16. The Bureau's analysis of this element of Issue 2 is so perfunctory, completely lacking any discussion of the relevant facts, that the conclusory language quoted above cannot be of any assistance to the Presiding Judge in resolving the designated issue. First, because Station KYEG(FM) has been off the air since April 1991, the Bureau fails to explain how AJI could have (a) notified the FCC of the station's "permanent discontinuance of operation at least two days before operation is discontinued;" and/or (b) forwarded the station's license and other authorizations to the FCC for cancellation immediately after the station went off the air. *See* 47 CFR §73.1750. AJI did not become the licensee of Station KYEG(FM) until February 1995. *See* AJI Findings, ¶1, n. 1; MMB Ex. 1, p. 1. Thus, AJI did not permanently discontinue the broadcast operations of KYEG(FM) because, as noted above, the station has been off the air since April 1991. Moreover,

the reason the station did not immediately resume broadcast operations following the assignment to AJI is that all of its equipment had been removed and disposed of. AJI Ex. 1, p. 1.

17. Furthermore, although the Bureau contends that AJI has "neither the capability nor the intent" to return Station KYEG(FM) to the air,<sup>7</sup> the relevant inquiry is whether AJI permanently discontinued the station's broadcast operations. As demonstrated above, AJI has secured a financial commitment from Texrock, and, consequently, now has the financial capability to reconstruct Station KYEG(FM) and resume broadcast operations. Furthermore, AJI has acted diligently by making substantial and repeated efforts to return the station to on-air operations, some of which include the following:

- Employing an engineering firm with whom Inman had worked "numerous" times in the past;
- Making a \$7,000 deposit on a new transmitter;
- Obtaining a financial commitment from long-time friend and broadcaster, John Pittman, that Pittman would provide the necessary funds to purchase the equipment to reconstruct Station KYEG(FM);
- Subsequently entering into a written agreement with a South Carolina broadcaster to provide funds to reconstruct KYEG(FM);

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<sup>7</sup> The Bureau's use of the phrase, "neither the capability nor the intent", demonstrates its fundamental misunderstanding of the relevant inquiry under this portion of Issue 2. The question whether AJI has the "capability and intent" to return Station KYEG(FM) to the air expeditiously is the focus of Issue 1, not Issue 2. Indeed, the relevant inquiry under this portion of Issue 2 is whether AJI "permanently discontinued" the operations of Station KYEG(FM), and, if so, whether the licensee forwarded the station's license to the Commission for cancellation.

- Upon the advice of AJI's former FCC counsel, entering into an agreement to sell the station and executing the requisite assignment application;
- After discovering that Pennington failed to file the assignment application, finding a third source of financing to reconstruct Station KYEG(FM) and return it to on-air operation.
- Hiring an operations manager and securing office space in Canadian, Texas; and
- Inman planning to leave for Canadian the beginning of the week of August 19, 1996, with his engineer and operations manager to secure studio space and begin installing equipment.

See AJI Findings, ¶¶9-14, 17, 21, 31-36. Indeed, Inman testified that he intends for Station KYEG(FM) to resume broadcast operations "immediately." AJI Ex. 1, p. 4. Therefore, because the record establishes that AJI has acted diligently and made substantial efforts to resume broadcast operations, the Bureau has failed to meet its burden of proof in alleging that AJI permanently discontinued the broadcast operations of KYEG(FM), and, consequently, has violated Section 73.1750 of the rules.

## V. Conclusion

18. As demonstrated herein, AJI has employed an engineering firm and secured the necessary financing to reconstruct Station KYEG(FM). AJI also is in the process of taking all of the necessary steps to return the station to on-air operation. Thus, the Bureau failed to meet its burden of proof in attempting to establish that AJI does not have the capability and intent to resume broadcast operations expeditiously.



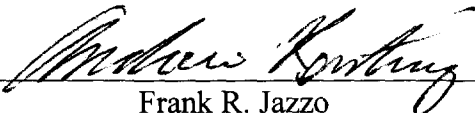
19. Although AJI has violated Section 73.1740 of the Commission's rules on two occasions, these rule violations were inadvertent, of relatively short duration, and do not reflect a deliberate flouting of the Commission's rules. They also are mitigated by AJI's extensive and continued efforts to return the station to on-air operation, as well as the actions of the licensee's former FCC counsel. Therefore, because AJI's minor violations of Section 73.1740 of the rules do not adversely affect the licensee's basic qualifications, they should not result in revocation of the station's license.

20. Finally, the Bureau failed to meet its burden of proof in attempting to establish that AJI violated Section 73.1750 of the rules. Indeed, AJI was not responsible for discontinuing the operation of Station KYEG(FM), and has acted diligently in attempting to return the station to on-air operation.

WHEREFORE, in light of the foregoing, it is respectfully requested that the issues designated against AJI Broadcasting, Inc., in the *Order to Show Cause and Hearing Designation Order* be RESOLVED in the LICENSEE'S FAVOR.

Respectfully submitted,

AJI BROADCASTING, INC.

By:   
Frank R. Jazzo  
Andrew S. Kersting

Its Counsel

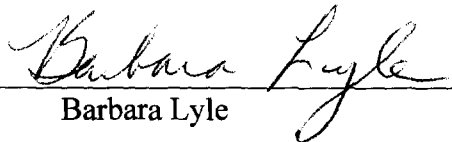
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October 8, 1996

**CERTIFICATE OF SERVICE**

I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 8th day of October, 1996, copies of the foregoing "Reply Findings of Fact and Conclusions of Law of AJI Broadcasting, Inc." were hand delivered to the following:

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Office of Administrative Law Judges  
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\_\_\_\_\_  
Barbara Lyle